Marlene H. Dortch, Esq. Secretary Federal Communications Commission 445 12th Street, S.W. Washington, DC 20554

Re: Joint Applications of Sprint Nextel Corporation, SOFTBANK CORP.,

and Starburst II, Inc. and Petition for Declaratory Ruling under Section

310(b)(4) of the Communications Act of 1934, as Amended

IB Docket No. 12-343

File No. ISP-PDR-20121115-00007

Written Ex Parte Presentation

## Dear Ms. Dortch:

The May 28, 2013, *ex parte* letter filing by Crest Financial Limited ("Crest") alleging "gun jumping" is wholly without merit. Like many of Crest's filings in this proceeding, Crest's letter is filled with misleading conjecture and fails to articulate a coherent argument based on the Federal Communications Commission's ("Commission's") rules and precedent. Indeed, Crest fails to cite a single Commission rule or precedent. This alone provides a basis for rejecting Crest's claims <sup>2</sup>

Aside from its failure to base its arguments on Commission rules and policies, Crest's allegations simply do not add up to "gun jumping." Crest does not allege that SoftBank has engaged in any of the activities that the Commission might consider unauthorized exercise of control. Under Commission precedent, transfer of *de facto* control is defined "as the power to dominate management of the licensee." Among the indicia of such power are: (1) present power to appoint a majority of the board; (2) authority to promote, appoint, demote or fire senior

Letter from Viet Dinh, Counsel to Crest, to Marlene Dortch, FCC Secretary, IB Docket No. 12-343 (May 28, 2013) ("*Crest Letter*").

<sup>&</sup>lt;sup>2</sup> Letter from Peter Doyle, FCC, to Richard Swift, et al., 26 FCC Rcd 15567 (MB 2011) (petitioner failed to properly allege unauthorized transfer of control), citing Area Christian Television, Inc., Memorandum Opinion and Order, 60 RR 2d 862, 964 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

<sup>&</sup>lt;sup>3</sup> In the Matter of Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfer of Control Involving Telecommunications Carriers, Memorandum Opinion and Order, 13 FCC Rcd 6293, 6297 (1998).

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executives that control the day-to-day activities of the licensee; (3) ability to play an integral role in major management decisions; (4) authority to pay financial obligations, including operating expenses; (5) ability to receive monies or profits from the facility's operations; and (5) unfettered use of all facilities and equipment. Crest did not and cannot point to any SoftBank conduct of that type.

Instead, Crest proffers statements by Masayoshi Son, SoftBank's Chairman and CEO, regarding his "vision" for a post-closing company and the potential post-transaction makeup of the Board of Directors.<sup>5</sup> These statements about plans after the transaction closes hardly represent evidence of an unauthorized transfer of control today. It also cites statements regarding Sprint's acquisition of Clearwire, over which SoftBank is entitled to exercise approval rights under the SoftBank/Sprint merger agreement, 6 exactly the kind of protective covenant the Commission has repeatedly found does not constitute an unauthorized transfer of control. Finally, Crest complains that SoftBank and Sprint have been meeting to discuss post-transaction synergies. Such discussions, however, in no way "cede day-to-day operating control" of Sprint to SoftBank. Rather, they simply and appropriately allow the parties to prepare for post-closing activities intended to optimize the transaction, once closed.<sup>8</sup>

Id.

Crest claims that Mr. Son recently discussed his vision regarding the post-transaction composition of the Sprint Board of Directors. Crest Letter at 3. In fact, with minor exceptions relating to recent adjustments made per discussions with the Committee on Foreign Investment in the United States ("CFIUS"), the Board structure described by Mr. Son was negotiated between the parties in October for the post-transaction company and is reflected in the bylaws of the post-transaction Sprint Corporation, which have been a matter of public record for more than six months. Sprint, Current Report (Form 8-K), Exh. 2.1 (October 15, 2012).

Merger Agreement, dated as of October 15, 2012, as amended, among SoftBank Corp., Starburst I, Inc., Starburst II, Inc., Starburst III, Inc., and Sprint Nextel Corporation, § 5.2(b)(v) (requiring consent, which may not be unreasonably withheld, to acquire an equity interest in a third party in excess of \$100 million).

See, e.g., In re Application of VoiceStream Wireless Corporation, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9797 ¶ 29 (2001) ("VoiceStream/Deutsche Telecom Merger Order") (holding that provisions granting purchasers certain approval rights over major transactions during the pre-closing period are "a common practice to induce investment and ensure the basic interests of such shareholders are protected"): Request of MCI Communications Corporation. British Telecommunications plc. Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3962, ¶ 14 (1994) ("The Commission has previously held that covenants that give a party the power to block certain major transactions of a company do not in and of themselves represent that type of corporate control envisioned by Section 310(d).").

See VoiceStream/Deutsche Telecom Merger Order ¶ 29.

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The Commission should ignore these deliberate last minute attempts to delay a transaction that clearly is in the public interest and for which no reasonable argument to delay or deny exists.

## Sincerely,

## **SPRINT NEXTEL CORPORATION**

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